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NUMBER 1051

# In the Supreme Court of the United States

OCTOBER TERM, 1924

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, PETITIONER,

*vs.*

HARRY F. STITT, RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI.

**(Page references in printed petition and brief refer to pages of printed record.)**

*To the Honorable, the Supreme Court of the United States:*

The St. Louis-San Francisco Railway Company, in support of this, its petition for writ of certiorari to be directed to the Supreme Court of Oklahoma, to review a decree of judgment rendered on the 18th day of September, 1923, and order denying petition for rehearing by said court on the 24th day of February, 1925, which said petition for rehearing had been filed according to the rules of and

with the permission of said court, and which said decree and order affirmed a judgment of the District Court in and for Pawnee County, State of Oklahoma, entered on the 29th day of November, 1921, in favor of respondent, Harry F. Stitt, and against this petitioner, in the sum of $20,000, damages alleged to have been sustained by respondent on account of personal injuries while an employe of said petition, shows:

I.

That this action was begun by petition under the Statutes of the State of Oklahoma, filed by Harry F. Stitt, claiming damages by reason of personal injury which occurred in the course of his employment as a boiler maker in the shops of petitioner at Tulsa, Oklahoma, on the 3rd day of September, 1920; that said petition alleged that respondent was injured by being struck in the eye by a sliver flying from the head of a prossering pin while said prossering pin was being struck by an air hammer in prossering the flues of an engine; that said pin was defective in that it had been improperly tempered, and was old, worn and battered; that petitioner was negligent in furnishing said pin in its said condition, which condition was known to

petitioner, or could have been known by ordinary care; that petitioner was further negligent in not furnishing respondent reasonably safe tools and appliances and a reasonably safe place in which to work (see petition, rec. 2-6).

Respondent also alleged in his petition, mistreatment on the part of the employes of petitioner in the hospital of petitioner, subsequent to his injury. However, the jury returned a separate verdict, fixing respondent's damages on account of said mistreatment in the sum of $1,000.00, which amount has been remitted by respondent and thus eliminated from this case (see rec., p. 122).

II.

That your petitioner duly filed its answer to said petition, denying negligence, and specially pleading that both petitioner and respondent were engaged in interstate commerce at the time of said accident, and that said case was governed exclusively by the Federal Act, known as the Federal Employers' Liability Act, and that respondent's injuries were the result of an assumed risk (see rec. pp. 9-10).

III.

That the record, a certified copy of which is

presented herewith, shows that there is no conflict of evidence regarding the question as to whether or not both petitioner and respondent were engaged in interstate commerce at the time of respondent's injuries, respondent relying solely upon the ground that the undisputed facts compelled the legal conclusion that both petitioner and respondent were not engaged in interstate commerce at said time.

IV.

The record shows petitioner was engaged in interstate commerce, operating a line of railway through the states of Missouri, Oklahoma and Texas (petition, rec. 3). The record further shows that respondent was a boiler maker employed by petitioner in its shops at Tulsa, Oklahoma; that at the time of the accident he was engaged in prossering flues of an engine which had been used exclusively for a long period of time for the purpose of pulling a passenger train from Tulsa, Oklahoma, to Enid, Oklahoma, and return (rec. 74); that the trains which said engine was used exclusively to pull were constantly engaged in carrying interstate passengers, interstate express and interstate United States mail from Tulsa, Oklahoma, to Enid, Oklahoma; that said trains constituted a link in a well

established channel of interstate transportation operated by petitioner from St. Louis, Missouri, through Tulsa, Oklahoma, to Enid, Oklahoma, and points west in the states of Oklahoma and California, and from Enid, Oklahoma, and points west, through Tulsa, Oklahoma, to St. Louis, Missouri, and points east; that on the day prior to the accident said engine had pulled its regular train from Enid, Oklahoma, to Tulsa, Oklahoma, carrying interstate mail, interstate express and interstate passengers, bound from Enid, Oklahoma, through Tulsa to points in Missouri, it being definitely established that four passengers on said train purchased tickets from the petitioner at Enid, Oklahoma, over its lines to Springfield, Missouri, and St. Louis, Missouri (rec. pp. 74-75); that on the day of said accident, and subsequent to said accident, the regular train which said engine pulled from Tulsa, Oklahoma, to Enid, Oklahoma, carried interstate passengers, interstate mail and interstate express (rec. pp. 76-77); that the character of repairs being performed by respondent at the time of his injuries were not such that took said engine out of service, or caused it to lose any time, but were what is known as "hot work" (rec.

p. 34), and were performed during the time that it was necessary for said engine to lay over in Tulsa, between its regular trips, but were necessary for the purpose of maintaining said engine and enabling it to do its interstate work; that said engine did not lose any time on account of said repairs, but made its regular trip from Tulsa, Oklahoma, to Enid, Oklahoma, on the day of the accident, leaving Tulsa on its schedule time within a few hours after said accident.

V.

The record further shows that at the time of the accident respondent was engaged in prossering flues in said engine by means of a prossering pin, prossering ring and air hammer, all of which were furnished by petitioner; that said engine had been placed over a pit, the fire drawn from it, and its fire box allowed to cool, after which respondent, together with his helper, had gone into the fire box, and at the time of the accident were engaged in prossering its flues; that the flues were prossered by the prossering pin being placed in the hole in the prossering ring, and both ring and pin placed in the flue, and the big end of the pin struck by the air hammer; that, while doing this work, respond-

ent was holding the pin, and his helper operated the air hammer; after respondent and his helper had been at work for about thirty minutes a sliver flew from the head of the prossering pin and struck respondent in the eye, causing his injury (rec., p. 22). Respondent testified that the pin slivered by reason of the fact that it had not been properly tempered at the time it was made; that if it had been properly tempered it would not have slivered (bottom of 29).

VI.

The record further shows that petitioner purchased its prossering pins from J. Faessler Manufucturing Company of Moberly, Missouri, established and recognized dealers in such tools; that said firm supplied nearly all of the big railroad companies with such tools, and had done so for a long time (rec. pp. 71-73 and 103-104); that petitioner's tools used by its employes at Tulsa, including its prosser pins, were inspected by the foreman about once a week, and oftener if defects occurred (rec. p. 98).

VII.

The record further shows that kerosene torches

were used as lights in performing this character of work. One of respondent's witnesses testified that it had been the custom at Tulsa, for many years, to use the kerosene torch in performing such work; that it was used in hot work for the reason that it could be moved about with less inconvenience (rec. 56, 58, 92 and 97).

In this connection there is no evidence shown in the record, of any character, tending to show that respondent's injuries were caused in any manner by reason of the kerosene torch being used instead of the electric light. Respondent testified that the pin slivered because it was improperly tempered and would not have slivered had it been properly tempered.

VIII.

The record further shows that the prossering pin being used by respondent at the time of the accident was a straight piece of steel about 9" in length, 1" in diameter at the big end, tapering to 7-16ths of an inch in diameter at the small end; that the prossering pin is the ordinary and common tool used by railroad men in prossering engine flues; that respondent was thoroughly familiar with a

prossering pin, having used prossering pins almost daily for many years. There was no contention on the part of respondent that the prossering ring or air hammer, or any appliance other than the pin itself, was, in any manner, defective.

IX.

At the conclusion of the testimony in the trial court, your petitioner requested the court to instruct the jury to return a verdict in its favor, which was refused, and exceptions saved.

X.

After your petitioner's request for a directed verdict had been refused, your petitioner submitted to the court its requested instruction No. 3, and requested that same be given. This instruction reads as follows:

> "You are instructed that the evidence in this case discloses that the tools which were being used by the plaintiff and his co-laborers, in repairing the engine at the time the injuries were received by the plaintiff, were purchased by the defendant from an independent company, and you are instructed in this respect that the degree of care which the law imposes upon the defendant in this connection is that its tools be purchased from a reputable and known establishment engaged in the business of manu-

facture and sale of said tools, and the defendant was entitled to rely upon said tools being reasonably safe and reasonably fitted to perform the work for which they were manufactured and sold, and unless the defect in the tool which resulted in the injury to plaintiff was obvious and apparent, or could be discovered by an inspection, then you are instructed that the defendant has discharged its duty in this respect to the plaintiff and could not be liable for latent defects in said tools, and the plaintiff herein assumed the risk of such injuries as are incident to and arise from the use of said tools in the business in which he was engaged,"

which request was refused, and exceptions saved (rec. p. 110).

XI.

Instead of giving your petitioner's requested instruction No. 3 as above quoted, the court gave to the jury paragraph No. 13 of the court's instructions to the jury, regarding the liability of your petitioner, which said instruction reads as follows:

"You are further instructed that if you find from a fair preponderance of the evidence that while the plaintiff was working in the general scope of his employment and in the exercise of ordinary care and caution while using a defective prosser pin, not knowing that the same was defective, and the same not being discoverable by the use of ordinary care on the part of plaintiff furnished to him by the defendant

herein, a piece of metal chipped or came off of said defective prosser pin while being used in the proper and ordinary way, striking the plaintiff in the left eye, thereby totally destroying the sight of the same, the plaintiff at all times acting within the general scope of his employment, and exercising ordinary care, then, and in that event, the plaintiff will be entitled to recover in such amount as by the evidence will compensate him, however, not to exceed fifty thousand dollars (rec. p. 118).

## XII.

With regard to your petitioner's defense of assumed risk, the court, over the objection of your petitioner, gave to the jury paragraph No. 11 of the court's instructions to the jury, which reads as follows:

"You are instructed that the plaintiff herein in accepting the employment as boiler maker for the defendant, assumed all of the ordinary and usual risks and perils incident to such employment, whether they were dangerous or otherwise, and all of the risks he had knowledge of or may by the exercise of reasonable care have known to exist, unless there was some agreement or understanding to the contrary. The plaintiff did not, however, assume such risks as were created by the defendant's negligence, if any be shown, nor such as were latent or were only discovered at the time of the injury complained of by the plaintiff herein" (rec. p. 117).

XIII.

As a result of the trial, the jury returned a verdict against your petitioner in the sum of $30,000.00 (rec. p. 123). The trial court ordered a remittitur in the sum of $5,000.00 and entered judgment for $25,000.00 (rec. pp. 123-125). From this judgment your petitioner appealed to the Supreme Court of the State of Oklahoma, which court, on the 18th day of September, 1923, affirmed the judgment of the lower court (rec. pp. 128-136). A petition for rehearing was filed within the time allowed by the rules of the Oklahoma Supreme Court (rec. pp. 137-174), which was denied on December 18, 1923 (rec. p. 174). Within the time allowed by rules of the Supreme Court, application for leave to file second petition for rehearing was filed by petitioner (rec. pp. 175-183). This was also denied on January 22, 1924 (rec. p. 184). On February 5th, 1924, the Supreme Court set aside its order denying leave to file second petition for rehearing, and granted leave to file second petition for rehearing and said case was set for oral argument (rec. p. 184). On February 8, 1924, pursuant to said permission of the court, your petitioner filed its second petition for rehearing (rec. pp. 184-203).

On February 24th, 1925, after said case had been orally argued as per order of the Supreme Court, second petition for rehearing was denied (rec. p. 203).

XIV.

Both the trial court and the Supreme Court held that respondent was not engaged in interstate commerce at the time of the accident, and that the case was not governed by the Federal Employers' Liability Act. The Oklahoma Supreme Court held that the trial court had correctly instructed the jury regarding petitioner's liability, petitioner's negligence, the duties which petitioner owed to respondent, and petitioner's defense of assumption of risk. The Oklahoma Supreme Court also held that the case had been properly submitted to the jury and the evidence was sufficient, under the instructions of the court, to sustain the verdict of the jury regarding your petitioner's liability (see opinion, rec. p. 133).

XV.

It is your petitioner's contention:

(1) That the undisputed facts shown by the record in this case compel the legal conclusion that

both petitioner and respondent were engaged in interstate commerce at the time of said accident, and this case is governed exclusively by the Federal Employers' Liability Act.

The holding of the Oklahoma Supreme Court in this case is not in accord with the decisions of this Honorable Court, which has repeatedly held, in effect, that where an engine has been permanently set apart to the work of hauling interstate commerce, even between two points in the same state, those performing repairs on said engine necessary in order that it may continue in and efficiently perform its interstate work, are engaged in interstate commerce, or work so closely related to it as to be a part of it.

In holding that this case is not governed by the Federal Employers' Liability Act, the Oklahoma Supreme Court evidently followed its former decision in the case of *C., R. I. & P. Ry. Co.* v. *Cronin*, 74 Okla. 38, 176 Pac. 919, in which it held that where a locomotive was constantly used to pull interstate trains, and had been taken from its line tracks and placed in a round house for repairs, and where the repairs were performed in time for it to make its return interstate trip, the employes per-

forming said repairs were not engaged in interstate commerce.

Your petitioner is advised that there is a conflict between the holding of the Oklahoma Supreme Court in the Cronin case, *supra,* and in this case, and the ruling of the Circuit Court of Appeals and this Honorable Court on said question. See *Baltimore & O. R. Co.* v. *Darr,* 4th Circuit Court of Appeals, 204 Fed. 751; *Industrial Accident Commission* v. *Davis,* 259 U. S. 182, 66 L. ed. 888; *Pederson* v. *D., L. & W. Ry. Co.,* 229 U. S. 146, 57 L. ed. 1125.

That in view of the conflict of authority between the Oklahoma Supreme Court and the Federal Court, there has been created confusion and uncertainty with regard to the application of the Federal law, and doubt concerning the rights and obligations of employers of labor, which ought not to exist. That certain other like cases are pending in the trial courts, and the Supreme Court of Oklahoma, and it, therefore, follows that unless this Honorable Court shall correct the errors of the court below, your petitioner will be deprived of a right, privilege and immunity under the Federal Employers' Liability Act in this and all similar cases, brought hereafter in the State of Oklahoma.

In this connection, your petitioner calls this Honorable Court's attention to the fact that the statutes of the State of Oklahoma and the rulings of the Oklahoma Supreme Court, regarding cases brought under the state statutes, materially and substantially differ from the law as announced by the Federal Employers' Liability Act and the rulings of the Federal courts regarding same.

(2) It is the contention of your petitioner that the trial court, by giving to the jury paragraph No. 13 of the court's instructions to the jury as above quoted, deprived your petitioner of the right guaranteed to it by the terms of the Federal Employers' Liability Act, to have the jury instructed and the respondent required to prove, before recovery could be had that respondent's injuries were caused, in whole or in part, by the negligence of the officers, agents, or employes, of your petitioner, or by reason of some defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, etc.

By paragraph No. 13 of the court's instructions to the jury the jury were told, in effect, that if they found from the evidence that while respondent was

working with a defective prosser pin furnished him by his employer, the defect in said pin not being discoverable by ordinary care on the part of respondent, and while using ordinary care for his own safety, a piece of metal came off of said pin and struck respondent in the eye, injuring him, then they should find for respondent in any sum not exceeding $50,000.00.

This instruction amounted really to a direction that the jury return a verdict for respondent. The facts set forth in said instruction were not disputed. Respondent had testified as a conclusion that the pin was defective by reason of being improperly tempered and that he was injured by reason of a sliver flying from the head of said pin and striking him in the eye; that if the pin had been properly tempered this would not have occurred. He further testified that he could not discover the defect in the temper of the pin by an inspection thereof.

All of the things named in said instruction may have been true, and still your petitioner may not have been guilty of any negligence. Said instruction not only deprived your petitioner of its rights guaranteed under the Federal Employers' Liabil-

ity Act to require respondent to prove that said defect, if one existed, was due to its negligence, but it took away from your petitioner every legitimate defense plead and proved by it. For defense in this case your petitioner relied upon: (a) General denial of negligence; (b) Ordinary care in conducting inspections; (c) If any defect existed in the pin, said defect was latent and not discoverable by an ordinary inspection; (d) Assumption of risk on the part of respondent. There was an abundance of proof offered from which the jury might have found for your petitioner on any one of said defenses. Yet the above instruction took away from your petitioner all of said defenses, and told them that if they found the pin was defective, and was being used by respondent with ordinary care, and respondent was injured by reason of the defect, they should find for respondent regardless of negligence, regardless of inspection, regardless of latentness of the defect, and regardless of assumption of risk.

This Honorable Court has held in *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, a Federal employers' liability case, that an instruction similar to the above deprived an em-

ployer of a right guaranteed to it under the Federal Act.

Instruction No. 13, in effect, directed the jury to return a verdict for respondent if they found certain undisputed facts to be true. It must be presumed, therefore, that the jury found for respondent by reason of said instruction, and not by reason of some other theory about which the evidence was in dispute.

It is the contention of your petitioner that the decision of the Supreme Court of Oklahoma in this case subverts the fundamental theory of the law, and its result is not only to relieve the claimant of the necessity of making essential proof, but to effectually deprive your petitioner of the protection of the Act of Congress invoked.

(3) It is the contention of your petitioner that the trial court in giving to the jury paragraph No. 11 of the court's instructions to the jury deprived your petitioner of the right to have said jury consider its defense of assumption of risk in case the jury should find that the risks were created or permitted to exist by reason of some negligence on the part of the railway company, and that the Su

preme Court of the State of Oklahoma erred in holding that the trial court had correctly instructed the jury in regard to your petitioner's defense of assumed risk.

By instruction No. 11 of the court's instructions to the jury the court told the jury, in effect, that the respondent in accepting employment from the railway company assum[illegible]d all of the ordinary and usual risks and peril[illegible]acident to such employment, *but did not, however, assume such risks as were created by petitioner's negligence.*

In *C., R. I. & P. Ry.* v. *Ward*, 252 U. S. 18, 64 L. ed. 430, this Court held an identical instruction with the above to be error, as it stat[illegible] without qualification, that the servant did not assume any risk created by the master's negligence.

In this case if the jury could have found under the evidence that the master was guilty of negligence in furnishing the pin, they should have been permitted to have gone further and found that respondent's many years of familiarity with such pins placed him in a position where he should have known that such pins, when struck as the pin in question was struck, would sliver, or that he

was in as good position to have known it as the master, and therefore that he assumed the risk, even though the master were negligent.

Wherefore, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, commanding that court to certify the case to this Court for a review and determination as provided in the Act of Congress known as the Judicial Code, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

W. F. Evans,
E. T. Miller,
C. B. Stuart,
J. F. Sharp,
M. K. Cruce,
Ben Franklin,
*Attorneys for Petitioner.*

**Affidavit.**

State of Oklahoma, County of Oklahoma, ss.

Ben Franklin, of lawful age, being duly sworn, says that he is one of the attorneys and of counsel for the St. Louis-San Francisco Railway Company, a corporation, petitioner named in a petition for certiorari filed with the Clerk of the Supreme Court of the United States on the 11th day of April, 1925 in the above styled and numbered cause, and has had personal charge of the prosecution of the appeal in said case from the District Court in and for Pawnee County, State of Oklahoma, to the Supreme Court of the State of Oklahoma, and the application for certiorari to be directed by the Honorable Supreme Court of the United States to the Supreme Court of the State of Oklahoma; that he has read said petition so filed, and by him subscribed, and that the statements and allegations made herein are true to the best of affiant's information and belief.

BEN FRANKLIN,

Subscribed and sworn to before me this the 20th day of April, 1925.

JUNE E. HEDGECOCK,

(Seal) Notary Public.

My commission expires January 27th, 1929.

No. 1051.

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**In the**

**SUPREME COURT OF THE UNITED STATES**

**October Term 1924**

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, PETITIONER,

vs.

HARRY F. STITT, RESPONDENT.

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**BRIEF AND ARGUMENT.**

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In this brief we will discuss the propositions relied on in our petition in the order as mentioned therein.

I.

**The undisputed facts shown by the record compel the legal conclusion that both petitioner and respondent were engaged in interstate commerce at the time of said accident, and this case is governed exclusively by the Federal Employers' Liability Act. The Supreme Court of the State of Oklahoma erred in holding that the case was not governed exclusively by said Act.**

Both the Supreme Court of the State of Oklahoma and the trial court, before whom this case was tried, were evidently of the opinion that the

facts in this case were not sufficient to bring said case within the terms of the Federal Employers' Liability Act—that is, they were evidently not of the opinion that both petitioner and respondent were engaged in interstate commerce, or in work so closely related to it as to be a part of it, at the time respondent was injured.

The question as to whether or not petitioner and respondent were engaged in interstate commerce at the time of respondent's injuries is, of course, all important so far as this application is concerned. If both parties were engaged in interstate commerce at the time of the injury, and the case governed by the Federal Employers' Liability Act, then, if the court deprived petitioner of an immunity guaranteed to it under said Act, the writ of certiorari applied for herein should be granted.

Regardless of the fact as to whether or not respondent intended to bring his case under the Federal Act, if the facts as developed at the trial showed that both parties were engaged in interstate commerce at the time of the alleged injuries, then said case is governed by the Federal Act and the petitioner is entitled to have said case tried by the law announced in said Act, and the

rule established by the Federal Courts regarding cases coming within the terms of said Act.

*Mondou* v. *N. Y. N. H. & H. R. Co.* (2d Employers' Liability Cases), 223 U. S. 1, 56 L. ed. 327.
*C., R. I. & P. Ry. Co.* v. *John F. Define,* 239 U. S. 52, 60 L. ed. 140.
*Erie Railroad Co.* v. *People of the State of New York,* 223 U. S. 671, 58 L. ed. 1149.
*Seaboard Air Line Ry. Co.* v. *Horton,* 223 U. S. 492, 58 L. ed. 1062.

If the Federal Employers' Liability Act, and the law announced by this Honorable Court relative thereto, governed this case, and the trial court refused to apply principles of law established by this Court relative to cases coming within the terms of said Act, and petitioner was deprived of an immunity guaranteed to it under the terms of said Act by the action of said court, and the Supreme Court of the State of Oklahoma refused to correct such error, then we take it that this Court will issue its writ of certiorari, review the record and correct said errors.

*Boldt* v. *Pa. R. R. Co.*, 245 U. S. 441, 62 L. ed. 365.
*New Orleans & Northeastern R. R. Co.* v. *Scarlet*, 249 U. S. 528, 63 L. ed. 752.
*Edward Pryor* v. *Williams*, 254 U. S. 43, 65 L. ed. 120.

The first question then to consider is, were both petitioner and respondent engaged in interstate commerce at the time of respondent's alleged injuries, and is this case controlled by the Federal Employers' Liability Act?

The testimony contained in the record shows that the engine on which respondent was at work at the time of his injury made regular trips from Tulsa, Oklahoma, to Enid, Oklahoma, and return. It is abundantly shown that the repairs were of such a character that it was not necessary to take said engine out of service (rec., p. 34). The engine arrived at Tulsa on its regular trip from Enid, Oklahoma, at 5:40 on the afternoon of September 2nd. In the early morning of September 3rd the fire had not been drawn from this engine. As expressed by some of the witnesses, it was still hot. It was chalked on the blackboard for certain minor repairs to be finished before it should leave on its regular return trip at 1:50 a. m. on September 3rd. The repairs were made and it did leave on its regular return trip on that day. The evidence further conclusively shows that the trip which this engine regularly made from Tulsa to Enid and return was a connecting link in a channel of com-

merce between St. Louis, Missouri, and points east and Enid, Oklahoma, and points west; that passengers, express and United States mail were carried by other trains to Tulsa, Oklahoma, and picked up by this engine, and carried to Enid, Oklahoma, and there picked up by other engines and carried to points west in Oklahoma, Texas and California (rec. 75 and 77). It is conclusively shown by the testimony that on the day prior to the accident, the last trip the engine made before the accident, it carried at least four interstate passengers from Enid, Oklahoma, to Tulsa, Oklahoma; two of these passengers were bound for Springfield, Missouri, and two for St. Louis, Missouri (Rec., pp. 74-75). It evidently carried mail for points outside the State of Oklahoma to the east, and express for points outside the State of Oklahoma. It is conclusively shown by the testimony that on September 3rd, on its regular trip next after the accident occurred, this train carried passengers from points outside the State of Oklahoma to Enid and points west; that it carried United States mail from points outside the State of Oklahoma to Enid, and that it carried numerous packages of express, some from Wichita, Kansas, and many

from New York City, New York, to parties living at Enid, Oklahoma (rec. pp. 99-101). The testimony shows that the trains pulled by this engine were constantly carrying interstate commerce, and were used by the petitioner as a connecting link in a line of transportation moving passengers, express and United States mail from St. Louis and points east to Enid, Oklahoma, and points west (rec. pp. 75 and 77).

We take it that the above testimony conclusively establishes the interstate nature of this engine.

In *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 59 L. ed. 1298, this Honorable Court said:

> "A brakeman on a 'pick-up' freight train running between points in the same state, but containing some cars loaded with interstate freight, who was injured while attempting, in the course of his employment, to set the brake on an intrastate car which had been cut out of the train and backed into a siding, was employed in interstate commerce, within the meaning of the Federal Employers' Liability Act of April 22, 1908, where the setting of such brake was necessary in order that the engine to which the car was attached might, when uncoupled, return to the train and proceed on its journey."

It cannot be said that the engine in question had ceased to partake of the character of commerce in which it was constantly engaged; there was no such withdrawal from service that would change the relation of the engine to the character of work being constantly performed by it. It was not withdrawn from the service—it was as much engaged in the service while it was being repaired to return on its regular trip as if no repairs had been necessary. This engine was set apart for a certain duty, and had been performing certain duties for a long period of time. No interruption was had in the relation of this engine to its duties at the time the accident occurred.

In *Industrial Accident Commission* v. *James C. Davis*, 259 U. S. 182, 66 L. ed. 888, this Honorble Court, in our opinion, clearly defines what must occur before an engine which is constantly used in interstate commerce can be said to have lost its character as an interstate commerce engine, as follows:

> "In some, the tracks, bridges and roadbed and equipment in actual use may be said to have definite character, and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not

> partake of that character, according to circumstances; and among the circumstances is the time taken for repairs,—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a side track or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time; or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations,—the relations of a workshop,—its employments and employes having cause in the movements that constitute commerce, but not being immediate to it."

In the case under consideration there was only a placement on a side track. This placement occurred so that there was no interruption of the actual use mentioned by this Honorable Court in *Industrial Commission* v. *Davis, supra.* In the above case this Honorable Court intimates that there might be an interruption of actual use for a short length of time and yet the engine not lose its relation to commerce, and still retain its character secured by such relation. However, in this case, no time was lost. The minor repairs performed were performed by "hot work," a term used by railway employes to designate work while the engine is yet hot, and work that will not interrupt the customary runs of the engine.

In *Pederson* v. *Delaware, Lackawanna & Western R. Co.*, 229 U. S. 146, 57 L. ed. 1125, this Honorable Court had under consideration the question whether or not an employe, carrying a sack of bolts to be used in repairing a bridge which was regularly used in both intrastate and interstate commerce, was employed in interstate commerce within the meaning of the Act. In speaking of the relation of a bridge worker to interstate commerce as compared with those working upon engines and cars, it was said:

> "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the intertate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce de-

pends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged * * * Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

If the engine in question was being used constantly to pull interstate commerce from Tulsa, Oklahoma, to Enid, Oklahoma, and return, thus forming a link in a chain of transportation of in-

terstate commerce; if it was actually used on its last trip in interstate commerce; if it was actually used on its next trip in interstate commerce, then we think it must be said that the engine, itself, when in actual use was engaged in interstate commerce or work so closely related to it as to be a part of it. Then, as was stated by this Honorable Court in the Pederson case, *supra,* the detail work necessary to the keeping of this engine in condition so that it could perform its interstate work, would be just as much a part of the work of interstate commerce as the work performed by the engine while it was actually on the road.

The same principles have been announced by this Honorable Court in

*Kinzel* v. *C. M. & St. P. Ry. Co.*, 250 U. S. 130, 63 L. ed. 893.

*Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. ed. 436.

*Second Employers' Liability cases* (*Walsh* v. *New York, N. Y. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44.

*Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C 172.

*St. Louis-San Francisco Ry. Co.* v. *Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann Cas. 1914C 156.

*North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. 305, Ann. Cas. 1914C 159.

This case is readily distinguishable from *Minn. & St. L. R. R. Co.* v. *Winters*, 242 U. S. 353, 61 L. ed. 358. In the Win' s case this Court stated that the agreed statement of facts consisted of only a few words. It was agreed that the engine had been used in the hauling of freight trains over defendant's line, which freight trains hauled both intrastate and interstate commerce, and it was so used after plaintiff's injury. The last time before the injury on which the engine was used was on October 18th, when it pulled a freight train into Marshalltown, and it was used on October 21st, after the accident, to pull a freight train out of the same place. This Court stated that the mere fact it had been used on October 18th to pull a freight train into Marshalltown, and was used three days later, and after the accident occurred, to pull a freight train out of said place, was not sufficient to show that the engine was devoted to interstate commerce. There seemed to be no certainty when

the engine was taken out of service on October 18 that it would be put back in interstate service, or in any service at all. It so happened that three days after it was taken out of service it pulled an interstate freight train out of Marshalltown. The court stated that the engine was not interrupted in an interstate haul to be repaired and go on. It had simply finished some interstate business and had not yet begun on any other. Its next work might have been interstate or confined to the state of Iowa, as it should happen. At the moment of the accident it was not engaged in any commerce.

In the case under consideration, the engine was permanently devoted to fulfilling a link in a chain of interstate commerce transportation. The evidence shows that it had been devoted to this work for a long time. At the time of the accident it was doing this work and no other. Its regular business was to haul a pick-up train constantly engaged in interstate commerce. The fact is not important in this case that the engine itself was confined at all times to points within the State of Oklahoma if it was constantly used in hauling interstate commerce from Tulsa, Oklahoma, to Enid, Oklahoma, and *vice versa*. It was as much engaged

in interstate commerce as if the trips it made extended out of the State of Oklahoma.

The character of the commerce being hauled is the test, rather than the route over which the engine travels in making the haul.

> Roberts on Injuries to Interstate Employes on Railroads, p. 135, Sec. 65.
> *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935.

The Oklahoma Supreme Court stated in its opinion that it could not ascertain from an examination of the record whether or not the trial court was of the opinion that the Federal Employers' Liability Act governed this case. However, the Supreme Court held that said Act did not govern the case. We do not think it is a matter of great importance whether the trial court thought the Federal Act applied, or thought that it did not apply. In this case the petitioner plead as a part of its answer that the case was governed by said Act. If the facts were sufficient to show, as we think they were, that said Act does apply to this case, and the court by its instruction to the jury deprived petitioner of an immunity guaranteed to it by said

Act, or by the principles established by this Honorable Court applicable to said Act, then the petitioner is entitled to redress at the hands of this Honorable Court.

II.

**In giving to the jury paragraph No. 13 of the court's instructions to the jury, the trial court deprived petitioner of its right guaranteed under the Federal Employers' Liability Act, to have the jury instructed and respondent required to prove that the defect, if one existed, in the instrumentality furnished the employe, must have occurred or have been permitted to exist by reason of some negligence on the part of the company, its officers or employes, before recovery could be had on that account, and the Supreme Court of the State of Oklahoma erred in holding that the trial court had correctly instructed the jury regarding the alleged negligence of the company and the duties which said company owed respondent.**

Paragraph 13 of the trial court's instructions to the jury reads as follows:

> "You are further instructed that if you find from a fair preponderance of the evidence that while the plaintiff was working in the general scope of his employment and in the exercise of ordinary care and caution while using a defective prosser pin, not knowing that the same was defective, and the same not being discoverable by the use of ordinary care on the part of the plaintiff furnished to him by the defendant

herein, a piece of metal chipped or came off of said defective prosser pin while being used in the proper and ordinary way, striking the plaintiff in the left eye, thereby totally destroying the sight of the same, the plaintiff at all times acting within the general scope of his employment, and exercising ordinary care, then and in that event the plaintiff will be entitled to recover in such amount as by the evidence will compensate him, however, not to exceed fifty thousand dollars" (rec. p. 118).

Assuming that the Federal Employers' Liability Act governs this case, the above instruction deprived petitioner of the right to require that respondent prove his injuries occurred by reason of some negligence on petitioner's part before he could recover. By the above instruction the court undertakes to tell the jury in the concrete just what facts are necessary for them to find in order to find for the plaintiff. The court tells the jury if they do find the facts set forth in said instruction, then it is their duty to find for the plaintiff. The jury may have found all the facts set forth in the above instruction and then may not have found that petitioner was guilty of negligence. By above instruction the court tells the jury that if they find that respondent was using a defective prosser pin, not knowing that it was defective, said defect not

being discoverable by an ordinary inspection, the pin being furnished by petitioner, and respondent was injured while in line of duty, and while exercising ordinary care, by a sliver flying from said pin and striking respondent in the eye, then they should find against petitioner and in favor of respondent. This instruction was in direct conflict with the Federal Act which limits the employe's right of recovery to injuries caused by the negligence of the employer.

This court has had before it, we think, this identical proposition. It was the contention of plaintiff in *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, that liability existed for injury to an engineer by reason of the failure of the railway company to furnish a guard which was claimed was necessary for the safe use of the steam gauge on the engine. In that case the court instructed the jury as follows:

> "If you find from the evidence that it (the locomotive engine) was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in

that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue 'yes.' "

Mr. Justice Pitney, in criticising this instruction, speaking for this court said:

"In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employers' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 55, 56 L. ed. 327, 348).

"The act is quoted in full in that case at p. 6. By its first section a right of action is conferred (under conditions specified) for injury or death of the employes resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed. * * *

"This clause has two branches; the one covering the negligence of any of the officers, agents or employes of the carrier, which has the effect of abolishing in this class of cases the

common law rule that exempted the employer from responsibility for the negligence of a fellow employe of the plaintiff; and the other relating to defects and insufficiencies in the cars engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon the negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employes is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. * * * *To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence;* and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was con-

clusive evidence of defendant's negligence. In this there was error" (italics ours).

By instruction No. 13, above quoted, the jury were emphatically instructed that the defect in the pin rendered the company liable, regardless of how the defect came about. They were told that the company was liable for the injury of an employe resulting from a defect or insufficiency in its appliances, however caused. They were told the very thing that this Honorable Court has said took away from the Act the words, "due to its negligence". The instruction imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In short, the court instructed the jury just what this Honorable Court said in the Horton case, *supra*, the court should not instruct the jury.

Under instruction No. 13 the company may have purchased the tool from a responsible and reliable firm; the defect may have been caused by a mistake in the temper when the tool was made; the defect may have been such as to make it impossible for the railway company to discover it by any inspection which it was its duty to conduct; the com-

pany may have fulfilled its entire duty in conducting inspections yet the jury had no alternative but to return a verdict for the respondent. There was evidence tending to support all of the above enumerated defenses, but the jury were not at liberty to consider any of them if they followed the admonition contained in instruction No. 13.

At page 70 of the record filed with this Honorable Court, respondent testified that the defect existed in the pin by reason of the pin being improperly tempered at the time it was made, and that one could not determine its defective condition by looking at it. Then, if this is true, the defect was latent and not discoverable by an inspection which it was the duty of the company to make, yet by the above instruction the jury are told to find for the plaintiff regardless of the latentness of the defect, and regardless of the fact as to whether or not the defect was discoverable by any inspection which came within the duties of petitioner.

A suit in a state court under the Federal Employers' Liability Act is governed by the rule of the Federal courts that the negligence of the defendant is an affirmative fact which plaintiff must establish.

*New Orleans & Northeastern R. R. Co. & U. S. F. & G. Co.* v. *Harris, Admr.*, 247 U. S. 367, 62 L. ed. 1167.

*Nitroglycerine Case* (*Parrott* v. *Wells*), 15 Wall. 524, 537, 21 L. ed. 206, 211.

*Patton* v. *Texas & P. R. Co.*, 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275.

*Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 501, 502, 58 L. ed. 1062, 1068, 1069.

*Boldt* v. *Pa. R. R. Co.*, 245 U. S. 441, 62 L. ed. 385.

*Marian J. Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 50 L. ed. 564.

*Texas P. R. Co.* v. *Barrett*, 166 U. S. 617, 41 L. ed. 1136.

In the case under consideration the railway company was not an insurer of the safety of its prosser pins, but was required to exercise only ordinary care to keep such pins in good repair, and if it used ordinary care it was not liable for an injury resulting to the respondent from a defect therein not discoverable by such ordinary care. The question of ordinary care was for the jury to pass upon under the evidence in the case, but by the above instruction, the court eliminated this question and told the jury that if the pin was defective, regardless of whether or not the company knew it, or could have known it by an inspection, and re-

spondent was injured while using it, then the company was liable.

As has been said above, the evidence in this case tended to show that the defect in the pin, if one existed, was latent—that is, it consisted of an improper temper of the metal composing the pin. If the defect was latent so that an inspection which was the duty of the company to make, would not discover it, then the company would not be responsible for the defect. This principle has been thoroughly established by this Court, as well as a majority of the state courts of this country.

*Atlantic, etc., R. Co.* v. *Reynolds*, 117 Ga. 47, 43 S. E. 456.

*Smith* v. *New York Cent. & H. R. R. Co.*, 58 N. E. 655.

Thompson on Negligence, p. 1053.

*Martin* v. *Highland Park Mfg. Co.*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671.

28 Cyc., page 1145.

*Moran* v. *General Fire Extinguisher Co.*, 259 Pac. 168, 102 Atl. 501.

*Export Cooperage Co.* v. *Ramsey* (Ark.), 202 S. W. 468.

*South* v. *Seattle, P. A. & W. Ry. Co.*, 168 Pac. 896.

*Skidmore* v. *West Virginia & P. R. Co.*, 41 W. Va. 293, 23 S. W. 713.

*Noyes* v. *Smith*, 28 Vermont 59, 65 Am. Dec. 222.

*Galveston M. & S. A. Ry. Co.* v. *Buch* (Tex.), 65 S. W. 681.
*Alexander* v. *Pa. Water Co.* (Pa.), 50 Atl. 991.
*Nutt* v. *South. Pac. Ry. Co.* (Oregon), 35 Pac. 653.
*Mulligan* v. *Crimmins*, 75 Hun. 587, 27 N. Y. Sup. 819.
*Roughan* v. *Boston & Lockhart Block Co.* (Mass.), 36 N. E. 461.
*Louisville & N. R. Co.* v. *Hinder* (Ky), 30 S. W. 399.

It is true that the court instructed the jury in this case that negligence must be shown on the part of the railway company proximately causing respondent's injuries, before he would be entitled to recover. However, in view of the fact that the court told the jury that if they believed the things stated in instruction No. 13 existed, then they should find for the respondent, this was equal to telling them that the things stated in instruction No. 13 constituted negligence on the part of the company which proximately caused respondent's injuries. After the giving of instruction No. 13, petitioner was not aided in the least by an instruction to the effect that negligence must exist before recovery could be had.

In view of the fact that the things set forth

in instruction No. 13, which, if existed, definitely fixed petitioner's liability, were not contradicted, then it must be presumed that the jury found against petitioner by reason of this direct admonition relative to undisputed facts, and did not find against the petitioner on account of some other theory about which the facts were in dispute. Then the only allegation of negligence now left in this case, other than the latent defect in the pin, is the failure on the part of the company to furnish respondent an electric light instead of a kerosene torch. There is not one scintilla of proof in the record that the use of the kerosene torch, instead of the light, in any manner caused or contributed to the cause of the accident. Respondent testified that the pin slivered because it was improperly tempered. No one testified anything tending to show that the pin slivered, or the respondent was struck by the sliver on account of insufficient light.

In *Kansas City & P. R. Company* v. *Ryan*, 52 Kan. 637, 35 Pac. 292, it was said:

> "If the company purchased the jack of a well known and reliable house, with an established reputation as a dealer in railroad tools and supplies, and the defect was latent or concealed, so that no one but a mechanic or a

skilled worker in iron could have discovered it by careful examination, the railroad company would not be guilty of negligence, in furnishing the jack for use to its employes."

Petitioner's requested instruction No. 3 was almost identical with the above excerpt, yet the trial court refused to give said instruction, but in stead gave instruction No. 13 above quoted. Petitioner's requested instruction No. 3 reads as follows:

"You are instructed that the evidence in this case discloses that the tools which were being used by the plaintiff and his co-laborers, in repairing the engine at the time the injuries were received by the plaintiff, were purchased by the defendant from an independent company, and you are instructed in this respect that the degree of care which the law imposes upon the defendant in this connection is that its tools be purchased from a reputable and known establishment engaged in the business of manufacture and sale of said tools, and the defendant was entitled to rely upon said tools being reasonably safe and reasonably fitted to perform the work for which they were manufactured and sold, and unless the defect in the tool which resulted in the injury to the plaintiff was obvious and apparent, or could be discovered by an inspection, then you are instructed that the defendant has discharged its duty in this respect to the plaintiff and could not be liable for latent defects in said tools, and the plaintiff herein assumed the risk of such injuries as are in-

cident to and arise from the use of said tools in the business in which he was engaged" (rec. p. 110).

The evidence in this case conclusively showed that the prosser pin in question was purchased from an independent and reliable establishment of good reputation; a company which had, for many years, furnished such tools to all of the big railroad companies of the country. When the railway company purchased the pin in question from this company of good standing and reputation, they had a right to presume in the absence of any defect which was discoverable by the use of ordinary care, that the tool was safe to furnish its employes, and were not negligent in failing to put the tool to some test, if such test is possible, which would determine the exact nature of the metal composing the interior of said pin.

It will be seen that the court's entire instructions to the jury bore out the idea expressed by instruction No. 13, *supra*. By instruction 3a the court told the jury "before the plaintiff is entitled to recover in this case he must prove (subdivision 2) that the defendant had failed to provide him with reasonably safe tools and appliances with which to do his work" (rec. p. 115). By instruc-

tion No. 4 the court told the jury, "a duty is indicated and measured by the exigencies of the occasion as they appear from the surrounding facts and circumstances at the time" (rec. p. 115). By instructioin No. 10 the court told the jury, "you are instructed that it is the duty of the employer to * * * see that same (appliances and tools) are kept in proper repair * * * an. the employe * * * is under no obligation to inspect the tools and appliances for latent defects." Then followed instruction No. 13 as above quoted, which, in effect, directed the jury to return a verdict for the defendant regardless of negligence. Petitioner may have failed in all particulars stated in these instructions to do the things mentioned therein, but such failure may not have resulted in negligence or carelessness. Petitioner may have failed to provide reasonably safe tools and appliances, but may not have been negiigent in that respect.

We submit that the giving of instruction No. 13, and other instructions above referred to, deprived this petitioner of an immunity guaranteed to it under the Federal Act. It deprived the petitioner of the right to have the jury instructed that respondent must prove some negligence upon

the part of petitioner proximately causing his injury, in the absence of which evidence respondent could not recover. It enabled respondent to recover from petitioner by the mere fact of establishing a defect in the pin and his injury, regardless of the fact as to whether or not the defect was caused by petitioner's negligence. (For more extended argument and authorities in support of this proposition, we respectfully call this Honorable Court's attention to the argument contained in our petition for rehearing filed with the Oklahoma Supreme Court shown at pages 137 to 174 of the record.)

III.

**The trial court in giving to the jury paragraph No. 11 of the court's instructions to the jury, deprived petitioner of the right guaranteed it under the Federal Employers' Liability Act to have the jury consider petitioner's defense of assumed risk, if the risks were created by petitioner's negligence.**

At the request of respondent, and over the objection and exceptions of petitioner, the court, by paragraph No. 11 of his charge, instructed the jury regarding the question of assumption of risk, as follows:

"You are instructed that the plaintiff herein

in accepting the employment as boiler maker for the defendant, assumed all of the ordinary and usual risks and perils incident to such employment, whether they were dangerous or otherwise, and all of the risks he had knowledge of or may by the exercise of reasonable care have known to exist, unless there was some agreement or understanding to the contrary. *The plaintiff did not, however, assume such risks as were created by the defendant's negligence, if any be shown*, nor such as were latent or were only discovered at the time of the injury complained of by the plaintiff herein" (italics ours) (rec. p. 117).

In *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, the trial court had instructed the jury as follows:

> "He (the employe) does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work."

This Honorable Court, speaking through Mr. Justice Pitney, said:

> "When the employe does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe assumes the risk, even though it arise out of the master's breach of duty."

The above instruction was harmful in this case for this reason:

Suppose the jury found that the defect in the pin existed, and conceding, for the moment, that there was sufficient evidence before them from which they might have found that it existed by reason of the negligence of the railway company, yet found that owing to the fact that respondent had been an experienced railway man for fifteen or eighteen years, and for many years had been constantly at work with such pin, should have known of the danger of the pin slivering, or was in as favorable a position as the company to have ascertained it, then, under the true rule, as set forth in the Horton case, *supra,* they must have found that he assumed the risk, but by the above instruction, which told the jury that in no event would he assume a risk created by the negligence of the master, the petitioner was deprived of having them pass upon this question.

In *C., R. I. & P. Ry. Co.* v. *Ward,* 252 U. S. 18, 64 L. ed. 430, this Honorable Court had before it an identical instruction with the instruction above quoted and given by the trial court in this case. That case was on writ of certiorari to the Supreme

Court of Oklahoma. The trial court had given the following instruction:

> "You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment, yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. *He does not, however, assume such risks as are created by the master's negligence,* nor such as are latent or are only discoverable at the time of the injury" (italics ours).

It will be seen that the above instruction is almost word for word with the instruction given by the trial court in this case. This Honorable Court, speaking through Mr. Justice Day said:

> "Treating the case, as the court below did, as one in which the injury occurred while the petitioners and respondent were engaged in interstate commerce, this charge as to the assumption of risk was not accurate, in stating without qualification that the servant did not assume the risk created by the master's negligence. We have had occasion to deal with the matter of assumption of risk in cases where the defense is applicable under the Federal Employers' Liability Act, being those in which the injury was caused otherwise than by the vi lation of some statute enacted to promote the safety of employes. As this case was

not one of the latter class, assumption of risk was a defense to which the defendants below were entitled. *Seaboard Ail Line R. Co.* v. *Horton,* 233 U. S. 492, 58 L. ed. 1062, L. R. A. 1915C 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B 475, 8 U. S. (C. C. A.) 834; *Jacobs* v. *Southern R. Co.,* 241 U. S. 229, 60 L. ed. 970, 36 Sup. Ct. Rep. 588."

The above instruction deprived petitioner of its right to have the jury consider its defense of assumption of risk if they believed that the defect in the pin was caused or permitted to exist by reason of the negligence on the part of petitioner. (For more extended argument and authorities in support of this proposition, we respectfully call the Court's attention to our second petition for rehearing filed with the Oklahoma Supreme Court by express permission of said Court, shown at pages 184 to 203 of the record.)

## CONCLUSION.

We have shown in this brief that this case was governed exclusively by the Federal Act known as the Federal Employers' Liability Act; that under the terms of that Act and ruling of this Honorable Court with reference thereto, it is absolutely essential that an employe show he has been injured by some negligence on the part of his master before

he can recover for injuries received in the course of his employment. Yet the trial court deprived petitioner of this right by instructing the jury that if respondent was injured while in the course of his employment using a defective pin, he could recover regardless of whether the defect was caused or permtted to exist by negligence of the company or not. The trial court, in effect, made the company an insurer of the safety of its appliances furnished its employes. This position, we contend, deprived us of a substantial right guaranteed to us under the Federal Act.

Petitioner requested the court to instruct the jury, in effect, that if the evidence showed that the tool in question was purchased from an independent and reliable establishment engaged in the manufacture of such tools, and the defect which resulted in plaintiff's injury was not obvious and apparent and could not be discovered by an inspection, then the company was not negligent in furnishing said tool to its employe, and would not be liable for latent defects. The court, in refusing to give to the jury this instruction, deprived petitioner of one of its principal defenses, and a defense to which it was entitled under the Federal Employ-

ers' Liability Act, and took away a substantial guaranty under said Act.

The trial court instructed the jury in plain terms that the respondent did not assume any risk created by a condition, the existence of which was negligence on the part of the company, even though the respondent knew, or by the exercise of ordinary care, could have known of the existence of the dangers so created by the master's negligence. This instruction, under the ruling of this Honorable Court, was error, and in this case deprived petitioner of the consideration of the jury, to which it was entitled.

In view of the above, we sincerely submit that the writ of certiorari should issue, this case be reviewed by this Honorable Court, and the manifest errors pointed out herein, be corrected.

Respectfully submitted,

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